IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 36/2013

In the matter between:

'MUSO TS'EUOA **APPELLANT**

AND

THE LESOTHO PRECIOUS GARMENTS
P+T TEXTILE (PTY) LTD **1ST RESPONDENT**
THE DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION **2ND RESPONDENT**

CORAM: SCOTT, A.P.
HOWIE, J.A.
THRING, J.A.

HEARD: 11 OCTOBER, 2013
DELIVERED: 18 OCTOBER, 2013

SUMMARY

Constructive dismissal of employee – Sec. 68 (c) of 1992 Labour Code – Unreasonable conduct by employer such as would entitle employee to terminate contract of employment without notice, by reason of employer's breach of a term of the contract – What constitutes such conduct – Employee kept waiting by employer, and subsequently resigning – Not constructive dismissal in circumstances – Other complaints of employee unfounded.

JUDGMENT

THRING, J.A.

[1] The appellant commenced employment with the first respondent on 9 October, 2001 as a personnel manager. He was posted to its branch at Mafeteng. On 15 May, 2002 he resigned. He maintains that his departure from the first respondent's employ was as a result of constructive dismissal. His dispute with his ex-employer was referred to the second respondent, the Directorate of

Dispute Prevention and Resolution, where an arbitration took place and the appellant's application for compensation, alternatively reinstatement, was dismissed on 2 July, 2002. He took the arbitrator's decision on review to the Court *a quo,* the Labour Appeal Court of Lesotho. In the Court *a quo* his application for review was dismissed, and the award of the arbitrator was confirmed. After a tour of the courts on constitutional issues, which it is not necessary to describe, the appellant now comes on appeal to this Court against the order of the Court *a quo*, with leave of the latter Court.

[2] The relevant events which took place on 13 and 14 May, 2002 which culminated in the appellant's resignation on 15 May, 2002 are accurately summarized in the judgment of the Court *a quo*, and it is not necessary to repeat them here in detail. In essence, the appellant's principal complaint is that, having been summoned by his employer to its head office in Maseru, he proceeded there on 13 May, but the general manager, a Mr Lieu, indicated to the appellant that he would not himself deal with the matter concerning the appellant, but that it would be

attended to by a Mr Peter Mokheseng. The appellant was then kept waiting for a whole morning without Mokheseng seeing him. He then left and returned to the premises the following day. He asked to see Mokheseng, but was told that the latter would see him only after he had attended to certain other employees. The appellant was expected to wait at the gate where job-seekers wait. All this annoyed the appellant. He then left and, the following day, wrote a letter resigning. He also had complaints about his remuneration and about his employer's grievance and disciplinary procedures.

[3] As for the appellant's complaint about being underpaid, the arbitrator found that this was an afterthought on the appellant's part, and that he had not, in fact, been underpaid. I can find no fault with this conclusion, for which there is a sound basis in the evidence.

[4] As for the appellant's dissatisfaction with the first respondent's grievance and disciplinary procedures, the

arbitrator held that, if the appellant's allegations had been true, the trade unions of which the majority of the first respondent's employees were members could have been expected to take up the matter and to have declared a dispute. He found that the appellant's argument in this regard had no basis, and "borders on being scandalous." I can also find no fault with the arbitrator's rejection of this part of the appellant's case.

[5] Whilst the Court *a quo* did not deal extensively in its judgment with the appellant's latter two complaints, it appears to have endorsed the arbitrator's findings. In addition, the Court *a quo* held that, instead of resigning, the appellant, as an aggrieved employee, should have written a "grievance letter" to the first respondent's general manager notifying him that his "unacceptable" conduct could lead to a forced resignation. This also seems to me to be correct. Nor was it contended on appeal that either the Court *a quo* or the arbitrator had erred in their findings on these subsidiary complaints of the appellant.

[6] Returning to the appellant's main complaint, i.e. being kept waiting on 13 and 14 May, 2002, the Court *a quo* considered the definition of the term "dismissal" in sec. 68 (c) of the 1992 Labour Code, which reads, in its material parts:

> *"For the purposes of section 66 'dismissal' shall include –*
>
> *(a) …*
>
> *(b) …*
>
> *(c) resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract."*

The Court *a quo* held that in constructive dismissal cases the *onus* of proving that continued employment has been "rendered intolerable" by the unreasonable conduct of the employer rests on the employee, and that it must be discharged on a balance of probabilities. It must also be shown (by the employee) said the Court *a quo*, that the unreasonable conduct concerned was wilful, and that the employee had no reasonable alternative other than to

resign. The Court *a quo* found that the conduct of the employer must be objectively unacceptable to a reasonable man; that constructive dismissal is an extraordinary and special form of dismissal, and that the employee must satisfy the Court of the existence of special circumstances.

[7] The Court *a quo* went on to find, on the facts, that the appellant had failed to prove that the first respondent had made continued employment intolerable for the appellant and that no reasonable alternative, other that resigning, existed for him.

[8] Mr Mohau, who appears for the appellant, submitted that the Court *a quo* had misdirected itself in that it had applied the wrong test in considering whether or not the appellant had been constructively dismissed, inasmuch as it had imported the requirement that the appellant had to show that his continued employment by the first respondent had been "rendered intolerable" by the unreasonable conduct of the latter. He contended that that is a requirement in the corresponding legislation in the

Republic of South Africa, viz. the Labour Relations Act, No. 66 of 1995, but that it does not appear in the applicable definition of "dismissal" in sec. 68 (c) of the 1992 Labour Code of Lesotho, the relevant part of which I have quoted above.

[9] I agree with Mr Mohau that the Court *a quo* appears to have misdirected itself in this regard. What an employee is required to establish in order to found a case that he has been constructively dismissed in terms of sec. 68 (c) of the Lesotho legislation is, in my view:

(a) that his employer has been guilty of conduct which is unreasonable in the circumstances;

(b) that the employer has thereby breached a term of the employee's contract of employment; and

(c) that by reason of the employer's unreasonable conduct and breach of contract, the employee would be entitled to terminate the contract without notice.

[10] The next question which arises is whether or not the appellant established these requirements.

[11] As to whether the conduct of the first respondent in keeping the appellant waiting on two occasions was unreasonable in the circumstances, the first respondent's witnesses tendered explanations for the delays which do not strike me as unreasonable, being partly based on misunderstandings. Put simply and briefly, the appellant was summoned to his employer's Maseru offices and, when he arrived there, the person whom he was required to see, Mokheseng, was not there. When the appellant returned the following day Mokheseng was there, but was unable to attend to him immediately. It must be borne in mind, I think, that during all the time that the appellant was cooling his heels, he was presumably being paid a salary: so that there can be no question of him being out of pocket, or of any other material disadvantage being caused to him by his having to wait. His complaint is simply that he felt humiliated and his feelings were hurt, *inter alia* by having

been made to wait at the gate with job-seekers. But as to this latter complaint, it transpired that everybody is required to wait at the first respondent's gate, not just job-seekers.

[12] Next there is the question whether the first respondent breached a term of the appellant's contract of employment. In the first place, the appellant made no attempt before the arbitrator or in the Court *a quo* to prove the terms of his contract: it is consequently safe to assume that he does not rely on a breach of any express term of the contract. In this Court Mr Mohau relied on what he submitted was a principle of the common law that in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties; that this implied term may be breached without the intention to repudiate the contract; and that it is sufficient if the effect of the employer's conduct as a whole, judged reasonably and seriously, is such that the employee cannot be expected to put up with

it. In my view the conduct of the first respondent in keeping the appellant waiting cannot be said to be in breach of any such implied term. That conduct was not calculated or likely to destroy or seriously damage the relationship of confidence and trust between them; nor can it realistically be concluded that the appellant could not have been expected to put up with it: sometimes delays are inevitable, albeit they may also be frustrating and annoying for those who are kept waiting.

[13] In the light of what I have already said, the question whether the appellant has met the third requirement above answers itself: because on my findings, the first respondent is guilty of neither unreasonable conduct nor breach of contract, it follows that the appellant was not entitled to terminate the contract without notice by reason of such conduct or breach.

[14] For the above reasons I am of the view that the order made by the Court *a quo* was correct, notwithstanding the misdirection to which I have referred.

[15] Consequently, the appeal is dismissed, with costs.

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W.G. THRING
JUSTICE OF APPEAL

I agree.

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D. G. SCOTT
ACTING PRESIDENT

I agree.

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C.T. HOWIE
JUSTICE OF APPEAL

For appellant: K.K. Mohau, K.C.

For respondent: No appearance